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Case No. 84-503

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

BETTY ADAMS, *et al.*,

Petitioner,

vs.

UNION CARBIDE CORPORATION,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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BRIEF IN OPPOSITION OF RESPONDENT UNION CARBIDE CORPORATION

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COUNTER-STATEMENT OF THE QUESTION PRESENTED

Should this Court review a grant of summary judgment by a federal court in a diversity action dismissing a state law claim against a chemical manufacturer for an alleged failure to warn, when both the federal district court and the federal circuit court of appeals, applying the correct standard for summary judgment under Rule 56 of the Federal Rules of Civil Procedure, determined that there was no genuine issue of material fact with regard to the reasonableness of the manufacturer's conduct and concluded that the manufacturer was not negligent as a matter of law.

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BRIEF IN OPPOSITION OF RESPONDENT UNION CARBIDE CORPORATION

COUNTER-STATEMENT OF THE CASE

Respondent, Union Carbide Corporation ("Union Carbide")[1] is the manufacturer of a liquid chemical known as toluene diisocyanate ("TDI"), which is used in the manufacture of urethane foams. Union Carbide sells TDI to the General Motors Corporation ("GMC") for use at its Elyria, Ohio, Fisher Body Plant. GMC uses TDI in making automobile polyurethane seat cushions. Petitioner, Betty Adams, was employed at GMC's Elyria plant

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[1] In accordance with Rule 28.1 of the Supreme Court Rules, Respondent states that the United States subsidiaries, excluding wholly owned subsidiaries, and affiliates of Union Carbide are: ACM Services, Inc., Arizona Welding Equipment Co., Miami Welding Supply, Inc., United States Welding, Inc., V. B. Anderson Co. and VBA Cryogenics Corp. (Foreign subsidiaries (except wholly-owned) and affiliates ar listed at the end of this Brief.)

during the period 1967 through 1978, when she retired due to disability. Petitioner claims that she was permanently disabled from work due to TDI hypersensitivity asthma caused by overexposure to TDI vapors at GMC's Elyria plant. TDI vapor is a respiratory irritant.

In 1980, Petitioner brought an action against Union Carbide in the Federal District Court for the Northern District of Ohio based upon a state law claim of negligence.[2] Jurisdiction was founded on diversity of citizenship. Petitioner alleged that Union Carbide had a duty to warn her directly of the potential dangers of overexposure to TDI, even though Union Carbide had warned GMC regarding the potential dangers of TDI and had provided comprehensive information to GMC regarding the safety of GMC personnel in the storage, handling and use of TDI.

Union Carbide's defense to Petitioner's claim was: (1) Union Carbide's duty to warn of the potential hazards of TDI under state law extended only to GMC and not to the employees of GMC, and (2) the information provided by Union Carbide to GMC was adequate to warn GMC concerning the potential dangers of TDI.

Summary judgment was granted to Union Carbide on the basis of its defenses. The Sixth Circuit affirmed the district court's grant of summary judgment. Both courts below held that as a matter of Ohio law, Union Carbide had satisfied its duty to warn of the potential dangers of TDI by informing GMC of the potential dangers of TDI and the methods for its safe handling and use. GMC had exclusive control over both TDI and the GMC

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[2] The action was brought by Betty Adams and her spouse, Joseph Adams. The claim by Joseph Adams was based on a loss of consortium caused by the alleged negligence of Union Carbide.

employees who came into contact with TDI. The courts below further held that the information supplied to GMC by Union Carbide about TDI was sufficient as a matter of law to warn GMC of the potential dangers of TDI.

We submit that this is not a case for this Court to grant certiorari. The only issue raised by the Petitioner is the appropriateness of summary judgment under the circumstances of this case based upon the negligence law of the State of Ohio. The applicable law relating to the duty of Union Carbide to warn of the potential dangers of TDI is entirely a matter of state law. Although the legal standard for summary judgment under Rule 56 of the Federal Rules of Civil Procedure involves federal law the appropriate legal standard for summary judgment is not at issue. Both the district court and the Sixth Circuit recognized and applied the legal standard for summary judgment as enunciated by this Court. Accordingly, there is no conflict between the decisions of the courts below and this Court. Petitioner claims only that summary judgment was not appropriate under the facts of this case. Two federal courts already have held that summary judgment was appropriate after a thorough review of the record.

REASONS FOR DENYING THE WRIT

A. The Legal Standard Applicable To Union Carbide's Duty To Warn A Third Party of Potential Dangers of Its Product Is Determined By State Law and Involves No Federal Question.

The jurisdiction of the federal courts below was founded solely on diversity of citizenship. (Petition at 1-2) In a diversity action, it has long been established by

this Court that a federal court is to apply state law to a negligence claim such as here, involving the duty of a manufacturer to warn third parties of the potential dangers of its product.[3]

Although the highest court in Ohio has not addressed the specific issue involved in this case, a decision by a state intermediate appellate court, which the district court relied on, indicates that Ohio courts would have applied the standard set forth in Section 388 of the Restatement (Second) of Torts (1965) to determine Union Carbide's liability.[4] *See Sams v. Englewood Ready-Mix Corp.*, 22 Ohio App.2d 168, 259 N.E.2d 507 (1969). Petitioner does not dispute that § 388 of the Restatement is applicable.[5] Under that standard, specifically comment

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[3] *See Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938); *see also Coleman v. Western Electric Co. Inc.*, 671 F.2d 980 (6th Cir. 1982)

[4] If the highest court in the State has not ruled on the issue, the federal court is bound to apply the law announced by a state intermediate appellate court unless it is convinced that the highest state court would decide differently. *See West v. American Telephone & Telegraph Co.*, 311 U.S. 223 (1940).

[5] The text of § 388 of Restatement (Second) of Torts, states:

> § 388. Chattel Known to be Dangerous for Intended Use
>
> One who supplies directly or through a third person a chattel for another to use is subject to liability to those whom the supplier should expect to use the chattel with the consent of the other or to be endangered by its probable use, for physical harm caused by the use of the chattel in the manner for which and by a person for whose use it is supplied, if the supplier
>
> a) knows or has reason to know that the chattel is or is likely to be dangerous for the use for which it is supplied, and

(Footnote Continued on next page)

n to § 388, a manufacturer is not required to warn directly an ultimate end user of the dangers of its product when the manufacturer has provided its vendee all the information necessary to the safe use of its product, provided that this method of disclosure gives a reasonable assurance that the information will reach those whose safety depends upon their having it.

The district court held that when Union Carbide warned GMC, an industrial user, of the potential dangers of TDI it was reasonable for Union Carbide under § 388 to rely on GMC to inform GMC's employees of the potential dangers and to implement the appropriate safety measures. An Ohio appellate case decided subsequent to the district court's opinion, which the Sixth Circuit duly noted in its opinion, reaffirms the correctness of the district court's holding. The Ohio case, *Millhouse v. General Tire and Rubber Co.*, 9 Ohio App.3d 203, 459 N.E 2d 623 (1983), involved the same product, TDI, which is involved here. The defendants in *Millhouse* were General Tire and Rubber Co. and an independent contractor, Mobile Wash, whom General Tire had hired to clean a tank car which had contained TDI. The plaintiff was the administratrix of the estate of a former employee of Mobile Wash who had died from overexposure to TDI while he was cleaning the tank car. The Ohio trial court granted summary judgment to General Tire, which was affirmed on appeal, because General Tire had satisfied

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(Footnote 5 Continued)

b) has no reason to believe that those for whose use the chattel is supplied will realize its dangerous condition, and

c) fails to exercise reasonable care to inform them of its dangerous condition or of the facts which make it likely to be dangerous.

its duty to warn of the potential danger of TDI when it warned Mobile Wash.[6]

Even if the propriety of the negligence law of Ohio as it relates to the duty of a manufacturer to warn third parties regarding the potential danger of its product was at issue, it is not an appropriate subject for this Court's review on certiorari. It involves no issue of federal law.

B. The Decisions Below are In Accordance With The Law of This Court and Other Circuits With Regard to the Standard For Summary Judgment Under Rule 56 of the Federal Rules of Civil Procedure.

There is no inconsistency in the standard for summary judgment under Rule 56 of the Rules of Civil Procedure which was applied by the district court and the Sixth Circuit and the standard enunciated by this Court. The Sixth Circuit stated in its opinion:

> The standard to be applied in determining motions for summary judgment was enunciated by this Circuit over 20 years ago and is still in accord with the overwhelming weight of authority:
>
> "In ruling on a motion for summary judgment, the court must construe the evidence in its most favorable light in favor of the party opposing the motion and against the movant. Further, the papers supporting the movant are closely scrutinized whereas the opponent's are indulgently treated."

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[6] Other jurisdictions have held to the same effect. *See, e.g., Reed v. Pennwalt Corp.*, 22 Wash. App. 718, 591 P.2d 478, *appeal dismissed*, 93 Wash.2d 5, 604 P.2d 164 (1979); *Younger v. Dow Corning Corp.*, 202 Kan. 674, 451 P.2d 177 (1969); *see also, Marker v. Universal Oil Products Co.*, 250 F.2d 603 (10th Cir. 1957) (applying the law of Oklahoma).

The Sixth Circuit adopted the holdings of its earlier decision in *Bohn Aluminum & Brass Corp. v. Storm King Corp.*, 303 F.2d 425 (6th Cir. 1962) and this Court's decision in *United States v. Diebold, Inc.*, 369 U.S. 654 (1962). The district court recognized that Union Carbide had the burden of showing the absence of any genuine issue of fact and that all reasonable inferences which might be drawn from the evidence must be viewed in the manner most favorable to the non-moving party, in accord with this Court's decision in *Adickes v. S.H. Kress & Co.*, 398 U.S. 144 (1970).

As in any negligence case, the reasonableness of defendant Union Carbide's conduct was an issue. Under Ohio state law Union Carbide had no duty to warn Petitioner directly of the potential dangers of TDI if (1) the information provided to GMC by Union Carbide was sufficient to warn GMC of the potential dangers of TDI and (2) Union Carbide was reasonable in relying on GMC to warn GMC employees regarding the potential dangers of TDI. The district court recognized that generally a determination whether a warning was adequate under the particular facts of a case is a jury question. The district court, however, also correctly recognized that when the legal standard for summary judgment is met, summary judgment must be granted even in a negligence case. This view is consistent with the decisions of this Court and the law of the other Circuits.[7] Petitioner has cited

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[7] Contrary to Petitioner's suggestion, the Sixth Circuit's decision in this case is consistent with its earlier decision in *Aetna Ins. Co. v. Cooper Wells & Co.*, 234 F.2d 342 (6th Cir. 1956) and the view of the other Circuits in *Bryant v. Technical Research Co.*, 654 F.2d 1337 (9th Cir. 1981) and *Croley v. Matson Navigation Co.*, 434 F.2d 73 (5th Cir. 1970). In fact, the Sixth Circuit in

(Footnote Continued on next page)

no case where summary judgment was prohibited per se, regardless of the circumstances of the case, solely because the claim was predicated on a certain legal theory, which is the position Petitioner is advocating before this Court. Summary judgment under Rule 56 is a procedural mechanism applicable to any and all actions, provided the requisites of the rule have been met.[8]

(Footnote 7 Continued)
this case cited as support for its decision, *Aetna*, *Bryant* and *Croley*. These cases stand only for the proposition that summary judgment is appropriate less frequently in negligence cases than with regard to other types of claims. For example, in *Bryant*, the Ninth Circuit determined that under the facts of that case summary judgment was not appropriate because the non-moving party had introduced sworn statements which created a dispute whether the manufacturer had provided an adequate warning to its vendee regarding the dangerous propensities of its product. The Ninth Circuit expressly stated, however, that "we do not foreclose the possibility that under some circumstances the adequacy of warnings may be decided by summary judgment. . . ." *Id.* at 1346. Both the district court and the Sixth Circuit recognized that principle as a correct statement of the law.

[8] The Notes of the Advisory Committee on Rules state in reference to Rule 56: "This rule is applicable to all actions, ..." *Dougherty v. Hooker Chemical Corp.*, 540 F.2d 174 (3rd Cir. 1976), cited by Petitioner, does not stand for a contrary proposition in the context of determinations under § 388 of the Restatement. The Third Circuit in *Dougherty* held only that a directed verdict in favor of the manufacturer was not proper in that case because it was apparent from review of all the evidence that a jury could reasonably find that the manufacturer's warning to its vendee was not adequate.

Moreover, while this Court in *Poller v. Columbia Broadcasting Systems, Inc.*, 368 U.S. 464, 473 (1962) held "that summary procedures should be used sparingly in complex antitrust litiga-

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After an exhaustive review of the record, both the district court and the Sixth Circuit concluded that Petitioner had introduced no evidence to support her assertion under Ohio law of negligent breach of duty to warn on the part of Union Carbide.

The undisputed facts show that GMC had exclusive control over both the TDI chemical and the GMC employees who came into contact with it. GMC employees did not manipulate open containers of TDI or transfer TDI from one container to another. Union Carbide delivered TDI to GMC in bulk shipments by tank trucks or rail car lots. Upon delivery, the TDI was pumped from the common carrier into a GMC storage tank. From the storage tank TDI was pumped by GMC into a closed vessel system to mixers where TDI was automatically combined by GMC with other chemicals to cause a chemical reaction known as "polymerization." This process completely altered the chemical properties of TDI by reacting TDI with several other chemicals to form polyurethane foam. The chemical mixture was then injected into molds the shape of cushions. The record below shows that petitioner's only alleged exposure to TDI vapors was when the cushions were removed from the molds.

TDI vapor was known to be a respiratory irritant.[9]

(Footnote 8 Continued)
tion where motive and intent play leading roles, the proof is largely in the hands of the alleged conspirators, and hostile witnesses thicken the plot" it did not state that summary judgment is never appropriate in antitrust cases.

[9] Standards for the maximum level of exposure to TDI vapor (.02 parts per million (ppm) of ambient air) were established by the Federal Occupational Safety and Health Administration. These standards were applicable to GMC's Fisher Body Division throughout the entire period of Petitioner's employment there.

Before shipping production quantities of TDI to GMC in 1969, Union Carbide supplied GMC comprehensive information regarding the potential dangers of TDI and the methods for its safe handling and use. The documentary information was thorough, explicit and based upon the information Union Carbide had at the time. Representatives of Union Carbide, including the Associate Corporate Medical Director, met with certain GMC personnel, including the Medical Director and Industrial Hygenist from GMC's Fisher Body Division, to discuss how GMC employees could be protected by GMC from the potential dangers of TDI. Union Carbide recommended in its literature preplacement physician examinations for those persons who could be exposed to TDI vapors at GMC and periodic health examinations thereafter. The documentary information supplied to GMC identified the specific respiratory problems allegedly suffered by Petitioner as one of the potential dangers of repeated exposure to TDI vapors by some individuals.

Both the district court and the Sixth Circuit concluded that there was no evidence before the trial court to even suggest that the warnings to GMC were not adequate or that Union Carbide would have a reason not to rely on GMC to inform GMC employees of the potential dangers of overexposure to TDI. The Sixth Circuit correctly rejected the bootstrap-type analysis which Petitioner is advancing before this Court that the alleged negligence of GMC in failing to adequately warn Petitioner, GMC's employee, of the potential danger of TDI constituted factual evidence of negligence by Union Carbide. As stated by the Sixth Court, the alleged negligence of GMC "cannot vicariously be imposed upon Union Carbide."

The proper legal standard for summary judgment under Fed.R.Civ.P. 56 was applied by the district court

and affirmed by the Sixth Circuit. There is no conflict between the decisions of the courts below and those of this Court or any other Circuit. The appropriateness of summary judgment under the facts of this case is underscored by the Ohio court decision in *Millhouse v. General Tire and Rubber Co., supra.*[10]

CONCLUSION

The only question Petitioner raises in her Petition turns on the particular facts of this case and, accordingly, is of interest only to the parties to it. Petitioner asks this Court to make a third review of the undisputed facts of the rather lengthy record in this case to determine whether there are any material facts in genuine dispute. This task is without any legal significance outside the limits of this case. Certiorari should be denied.

Respectfully submitted,

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[10] Rule 56 of the Ohio Rules of Civil Procedure for summary judgment is based upon Rule 56 of the Federal Rules of Civil Procedure. *See Williams v. First United Church of Christ*, 37 Ohio St.2d 150, 309 N.E.2d 924, 925 (1974).

(Continuation of footnote 1)

The following are Union Carbide's foreign subsidiaries (except wholly-owned subsidiaries) and affiliates: Union Carbide Egypt S.A.E.; Union Carbide Ghana Limited; Union Carbide Kenya Limited; Union Carbide Nigeria Limited; Union Carbide Sudan Limited; Union Carbide Canada Limited; Chemos Industries Pty. Limited (Australia); Union Carbide Australia Limited; Union Carbide India Limited; P.T. Agrocarb Indonesia; Nippon Unicar Company Limited (Japan); Union Showa K.K. (Japan); Sony Eveready, Inc. (Japan); Union Gas Company Limited (Korea); Union Carbide Malaysia Sdn. Bhd.; Union Polymers Sdn. Bhd. (Malaysia); Union Carbide New Zealand Limited; Union Carbide Ceylon Limited (Republic of Sri Lanka); Indugas N.V. (Belgium); Calida Gas N.V. (Belgium); La Littorale S.A. (France); Argon, S.A. (Spain); Unifas Kemi A.B. (Sweden); Electro Manganes Ltda (Brazil); S.A. White Martins (Brazil); S.A. White Martins Nordeste (Brazil); Union Carbide Mexicana, S.A. de C.V. (Mexico); Electrode Maatskappy Van Suid Afrika (Eiendoms) Beperk (Republic of South Africa); Tubatse Ferrochrome (Proprietary) Limited (Republic of South Africa).